No. 20155

United States
COURT OF APPEALS
for the Ninth Circuit

EDITH L. HIGLEY, Widow of Darold B. Higley, Deceased,

Appellant,

v.

J. J. O'LEARY, Deputy Commissioner, Fourteenth Compensation District, W. J. JONES & SON, INC., and NATIONAL AUTOMOBILE & CASUALTY INSURANCE CO.,

Appellees.

Appeal from the United States District Court for the District of Oregon

APPELLANT'S BRIEF

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POZZI, LEVIN & WILSON,
PHILIP A. LEVIN,
808 Standard Plaza, Portland, Oregon 97204,
Proctors for Appellant.

STEVENS-NESS LAW PUB. CO. PORTLAND, ORE. 7-65

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J. J. O'LEARY, Deputy Commissioner, Fourteenth Compensation District, W. J. JONES & SON, INC., and NATIONAL AUTOMOBILE & CASUALTY INSURANCE CO.,

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JURISDICTION

Appellant is the widow of a workman who died of a attack while working as a longshoreman employed by W. J. Jones & Son, Inc. She made timely claim for death benefits for herself and the surviving children of the deceased workman, under the Longshoremen's and Harborworker's Compensation Act, 33 U.S. C.A. § 901, et seq. (R. 4). Her claim was rejected by a compensation

order dated August 13, 1964 (R. 5-6). The District Court entered a decree granting the motion of the Deputy Commissioner for a summary judgment and denying the motion of libelant for a summary judgment (R. 81-82). Because of doubt as to the appealability of the decree in question, a further judgment was entered on June 30, 1965 (R. 93).

This is a civil suit in admiralty commenced by a libel in personam to review the compensation order. The order was made on August 13, 1964 (R. 6). This suit was filed on September 9, 1964 (R. 1). The District Court had jurisdiction by virtue of 33 U.S.C.A. § 921 (b), and 28 U.S.C.A. § 1333. The factual basis for jurisdiction is set forth in Article III of the libel (R. 2), which was admitted by the other parties, except for the allegation that decedent sustained an employment related injury that resulted in his death (R. 7, 14-15).

The decree of the District Court granting libelant's motion for summary judgment was dated and filed on April 5, 1965 (R. 81-82). Notice of Appeal was filed on April 22, 1965 (R. 83). By reason of doubt as to the finality of the decree of April 5, 1965, a further judgment was entered on June 30, 1965 (R. 93), and notice of appeal from this judgment was filed on June 30, 1965 (R. 94). This Court has jurisdiction pursuant to 28 U.S.C.A. § 1291.

STATEMENT OF THE CASE

On December 16, 1963, decedent, while employed as a longshoreman by W. J. Jones & Son, Inc., sud-

denly collapsed and died (R. 37, 40). It was about four o'clock in the afternoon, and his gang had been working since eight that morning (R. 33, 41). Decedent had worked normally during the entire day, and had made no complaints regarding his physical condition (R. 34-35, 39-40). Nothing unusual was noticed by his fellow workmen prior to his collapse (R. 34, 39).

The work in which he was engaged at the time of his death was moving heavy timbers (R. 33) into place with a peavey (R. 34). The men had been doing the same work all day (R. 33), and the work was pretty steady during the course of the day (R. 35).

The type of work he was doing is one of the two heaviest jobs on the Longview waterfront (R. 33, 36). It is harder than the rest of the longshore work (R. 39), and takes "brute strength" (R. 36).

At the time he collapsed, decedent and three other men were engaged in peaveying the timbers into place, and decedent was "shoving or straining on his peavey" (R. 35, 40), against a timber which four men could not have lifted (R. 39). While he was pushing against the timber, he fell over on to the winch driver, turned several colors, gasped or snorted, and died (R. 37, 40-41).

Decedent was 43 years of age at the time of his death (R. 25). His health appeared to be good, so far as his wife could observe (R. 25). He was seen by a doctor on two occassion in November, 1962, for chest pain. His condition was diagnosed as "possible coronary arteriosclerosis," which was "a symptomatic" (*sic*)

(R. 26, 72-73). At that time, he was off work from December, 1962 to March, 1963 (R. 29), and then was released by the doctor to go back to work (R. 30). It was then he commenced longshoring (R. 27, 30) at which he worked steadily until his death (R. 27). Before the episode of November, 1962, he had worked for about four months at a service station (R. 29), and for approximately 12 years prior to that time, he had worked as a crane operator (R. 28-29). Decedent was a moderate smoker and very seldom drank (R. 31).

Medical testimony was produced from four physicians. Dr. Buck, a pathologist who had performed an autopsy on decedent (R. 42), testified that he died as a direct result of disease of his coronary arteries and an acute occlusion of the descending branch of the left coronary artery, all superimposed on an advanced atherosclerosis (R. 43-44). He found evidence of an occlusion of the right coronary artery which had been present for 7 to 28 days (R. 43), and a very recent occlusion of the left coronary artery, which was present for 4 to 12 hours (R. 43). There were no other pre-existing conditions of significance (R. 44). There was almost total absence of edema of the lungs, which was indicative of a very sudden death (R. 45). Dr. Buck was not asked to express an opinion as to whether or not the death was work-related.

Claimant's expert, Dr. Murphy, a specialist in internal medicine (R. 49), expressed his opinion, based upon a hypothetical question (R. 50), that the unusual exertion which decedent was performing aggra-

vated a pre-existing condition and set in motion the processes that resulted in the occlusion of the coronary vessels (R. 51-52). The strain which the decedent was undergoing would tend to increase the blood pressure, increase the heart rate, and increase the respiration, by all of which means it would tend to bring about the occlusion which caused the death (R. 52). Clinically, Dr. Murphy stated that he was unable to agree that the second occlusion occurred 4 hours before death (R. 53), because all of the evidence indicated that it happened suddenly (R. 54-55).

The employer called Dr. Wilhelmi, also an internist (R. 56), who testified, based upon a hypothetical question (R. 57-59), that the physical effort in which the workman was engaged was not related to the occurrence of the occlusion (R. 60). Dr. Wilhelmi admitted that, had he known the condition of the decedent's heart, he would have recommended against strenuous physical activity (R. 63-64), and if he had known that the man had had a coronary occlusion within the last couple of weeks he would not have allowed him to work at all, even at light work (R. 65). The doctor testified, however, that, in his opinion, if the decedent had stayed home in an oxygen tent all day, he would have died at precisely the same time (R. 68-69), and that the increase of heart rate and blood pressure and the other effects of strenuous physical activity had nothing to do with his death (R. 69).

The employer also called Dr. Leonard Rose, whose testimony was inadvertently omitted from the record

filed by the Deputy Commissioner with the District Court in support of the Motion for Summary Judgment. It is stipulated by all of the parties that his testimony is cumulative with respect to the issues involved in this appeal, and that it is not necessary for the Court to consider his testimony in reviewing the correctness of the Deputy Commissioner's decision (R. 96-97).

Based upon the foregoing facts, the Deputy Commissioner concluded that (R. 6):

> ". . . for approximately nine months previous to said date the deceased had been employed as a longshoreman and the work in which he was engaged at the date of his death was similar to and no more strenuous than the type of work in which he was customarily engaged; that the immediate cause of death was an acute anterior myocardial infarction due to advanced atherosclerosis of the coronary arteries and acute thrombosis of the left coronary artery; that the work in which the deceased had been engaged prior to his collapse and death did not contribute in any way to his death and the deceased did not sustain an accidental injury arising out of and in the course of his employment by the employer above named."

Claimant brought injunction proceedings in admiralty pursuant to the provisions of 33 U.S.C.A. § 921 (b) in the United States District Court for the District of Oregon. The employer and carrier were permitted to intervene (R. 13). The Deputy Commissioner and the claimant each moved for a summary judgment (R. 16, 76). The Honorable William G. East rendered a brief

Memorandum (R. 78-80) affirming the Deputy Commissioner, and a decree was entered granting the motion of the Deputy Commissioner for summary judgment and denying claimant's motion for summary judgment (R. 81-82).

The questions presented are as follows:

A. Did the Deputy Commissioner err in finding that the work in which deceased was engaged was similar to and no more strenuous than the type of work in which he was customarily engaged, when the uncontradicted evidence was directly to the contrary?

B. Did the Deputy Commissioner apply an erroneous legal standard to determination of the issues before him in giving consideration to the question whether the work in which deceased was engaged was more strenuous than that in which he was customarily engaged?

C. Does the undisputed evidence require a finding that the claim should have been accepted?

SPECIFICATION OF ERROR

The District Court erred in granting the motion of the Deputy Commissioner for a summary judgment confirming the compensation order, and in refusing to grant the motion of the claimant for a summary judgment setting aside the compensation order.

SUMMARY OF ARGUMENT

The Deputy Commissioner made a finding that the work in which decedent was engaged "was similar to and no more strenuous than the type of work in which he was customarily engaged." This finding is erroneous, both legally and factually.

The finding is erroneous legally because it makes no difference in determining if the death is compensable whether the strain to which decedent was subjected was normal or abnormal. In either event, if the strain contributed to the death—and the statute creates a presumption that it did—claimant is entitled to compensation.

The finding is erroneous factually because the undisputed evidence in the record establishes that decedent, who had been working hard all day, was performing one of the two hardest jobs on the waterfront, and, at the moment of his collapse, was straining with three other men to move a heavy timber.

When the correct legal standard is applied to the undisputed facts in the record, claimant contends that the Court should order the rejection order set aside, and that claimant be awarded compensation. At the least, she is entitled to have the cause remanded for the application of the correct rule to the facts in the record.

ARGUMENT

A. Introductory Statement.

In presenting argument on this appeal, claimant fully understands and appreciates the heavy burden imposed upon one who attempts to assert that a compensation order should be set aside. The Deputy Commissioner's findings of fact are presumed to be correct, and they must be accepted unless unsupported by substantial evidence in the record considered as a whole. *O'Leary* v. *Brown-Pacific-Maxon, Inc.,* 340 U.S. 504, 71 S. Ct. 470, 95 L. Ed. 483 (1951); *Voris* v. *Eikel,* 346 U.S. 328, 74 S. Ct. 88, 98 L. Ed. 5 (1953). It is nevertheless the rule that the findings of the Deputy Commissioner must be supported by evidence in the record, and his ultimate conclusion must be based upon the application of the appropriate legal standard to the facts in the record.

In this case, claimant respectfully submits that the Deputy Commissioner went astray in both of the foregoing particulars, and that, in both respects, the defect is related to the Deputy Commissioner's finding that the work in which decedent was engaged at the time of his death was "no more strenuous than the type of work in which he was customarily engaged . . ." This finding is not only wholly unsupported by the evidence; it is in direct contradiction to the undisputed evidence. Moreover, it strongly suggests the application by the Deputy Commissioner of an erroneous legal standard for determining what injuries are compensable. Absent this finding, it would be difficult to assert

that the Deputy Commissioner's rejection order is wholly without support in the record, but this finding ". . . is like the thirteenth stroke of a crazy clock, which not only is itself discredited but casts a shade of doubt over all previous assertions." Herbert, Uncommon Law (1935) p. 28.

There is no way for claimant to know why this finding was deemed by the Deputy Commissioner to be necessary, but consideration of whether claimant's work was more strenuous than normal at least implies that the Deputy Commissioner considered this to be a crucial factor in determining whether the death in question was compensable. As will be hereinafter shown, it is a factor which is totally irrelevant under the applicable law. The American Medical Association's Committee on the Effect of Strain and Trauma on the Heart and Great Vessels in its Report, published in *Circulation,* Vol. 26, pp. 612-622 (Oct., 1962), recommended that a different legal standard; namely, that heart failure of the congestive, coronary insufficiency or myocardial infarcation types should be considered related "to physical or emotional exertion only if the heart failure occurs during an actual period of stress clearly unusual for the individual involved." The determination of what is and what is not work-connected, however, is a question for Congress and the Courts, neither of which has seen fit to adopt this recommendation.

For a detailed and informed discussion of the policy, medical and legal factors entering into the determination of compensability of a heart death, see Marcus, "Prob-

lems of Compensability in Cardiovascular Disease Cases," 1964 Proceedings of the A.B.A. Section of Insurance, Negligence and Compensation Law, p. 405.

In any event, as hereinafter discussed, the uncontradicted evidence establishes that, at the very moment of his death, decedent was engaged in the most strenuous part of the most strenuous type of work which he did during the few months that he was a longshoreman. The contrary conclusion of the Deputy Commissioner is without any factual foundation whatever.

B. It is Irrelevant Whether the Work in Which Decedent Was Engaged was Unusually Strenuous.

Claimant respectfully submits that the question of whether the work in which decedent was engaged was similar to and no more strenuous than the type of work which he customarily did should never have arisen. It indicates the application by the Deputy Commissioner of a totally erroneous standard of compensability. As the Court stated in *Hancock* v. *Einbinder,* 310 F.2d 872, 876 (CA D.C. 1962):

> "The Deputy Commissioner's questioning of witnesses and certain passages in his compensation order emphasized the fact 'that the employee at the time of his death was performing duties consistent with the normal part of his job.' If his ultimate decision was based on the notion that an injury is not compensable unless it resulted from the performance of unusual work, he was mistaken. We said in *Commercial Casualty Ins. Co.* v. *Hoage,* 64 App. D. C. 158, 159, 75 F2d 677, 678 (1935):
>
> "'* * * It has been held a number of

> times, and we think correctly, that an accidental injury may occur notwithstanding the injured is then engaged in his usual and ordinary work * * *. It is enough if something unexpectedly goes wrong within the human frame. * * *' "

To the same effect is the holding in *T. Smith & Son, Inc.* v. *Donovan,* 227 F. Supp. 640, 643 (E.D. La., 1964), in which the Deputy Commissioner found that the work that decedent did on the day of his death "would not be considered strenuous work for a person of normal health . . . ," but nevertheless determined that a myocardial infarction was work-connected.

There may be substantial justification for an argument that a person who dies as a result of the normal strain of doing his normal work should not be considered to be a job-related casualty. This, as previously indicated, is a conclusion reached by the American Medical Association Committee. It is not, however, a permissible standard to be applied by the Deputy Commissioner. The applicable law which he administers presumes the claim to be compensable "in the absence of substantial evidence to the contrary." 33 U.S.C.A. § 920 (a); *Robinson* v. *Bradshaw,* 206 F.2d 435, 438 (CA D.C., 1953). Moreover, "that the injury occurs in the course of the employment strengthens the presumption that it arises out of it." *General Accident Fire and Life Assurance Corporation* v. *Donovan,* 251 F.2d 915 (CA D.C., 1958). It has even been held that occurence of a heart attack "immediately follow-

ing strenuous activities in itself raises an inference of a causal relationship between the activities and the attack." *Todd Shipyards Corp.* v. *Donovan,* 300 F.2d 741, 742 (CA 5, 1962).

In the light of this authority, it was not open to the Deputy Commissioner to determine that the death was not compensable because decedent's activities were no more strenuous than usual. They were strenuous, and, as the Court held in *Hancock* v. *Einbinder,* it made no difference whether they were more so than customary. See also *Vinson* v. *Einbinder,* 307 F.2d 387 (CA D.C., 1962), in which the strenuous work decedent was doing when he died was "a normal part of his job."

In this state of affairs, claimant is at least entitled to a reversal and a remand to the Deputy Commissioner for application of the appropriate standard. Compare *Vendemia* v. *Cristaldi,* 221 F.2d 103, 106 (CA D. C., 1955). In that case, it was held that a finding that a death from heart attack was not caused by an injury arising out of and in the course of the employment was insufficiently supported by the findings made by the Deputy Commissioner to enable the Court to determine the basis upon which his rejection order was made. It seems clear that the identical rule should apply where the findings make it apparent, although not explicit, that an erroneous legal standard was adopted.

C. The Uncontradicted Evidence Established the Strenuousness of the Work.

Only two witnesses testified regarding the nature of the work which decedent was doing at the time of his

death, and only decedent's wife testified regarding the work he had done previously. He had worked for twelve years operating a crane, then for four months in a service station, and then had been off work for several months until he started longshoring. He longshored for nine months before his death. Thus, the record indicates that the type of work that he had been doing prior to the nine months before his death was not heavy manual labor.

The record establishes that, on the day of his death, he had been working hard all day at the hardest type of work on the Longview waterfront, and, at the exact moment he collapsed, he was "shoving or straining on his peavey" along with three other men in an effort to manhandle a heavy timber into place, a job taking "just brute strength." The timber was too heavy for four men to have lifted.

If it were possible to contradict this evidence, either with regard to the general type of work available on the Longview waterfront, or the precise type of work which decedent was doing at the time of his death, no one should have been better able to produce such evidence than his employer, a stevedore company. No such evidence was produced.

It is, therefore, uncontradicted that, during the previous nine months, decedent had been doing work harder than he had been previously accustomed to; that on the day of the accident, he was working hard at the most strenuous part of that work, and that, at the moment of his collapse, he was straining to perform the

most physically demanding part of the hardest work involved in longshoring.

The decision in *Vinson* v. *Einbinder,* 307 F.2d 387 (CA D.C., 1962) is squarely in point. In that case, decedent died after one and a half to two and a half hours of driving and backing a truck on which a heavy crane was mounted. The Deputy Commissioner found that this was "a normal part of his job" and that he "was not subjected to heavy physical strain." He held that the death did not result from injury arising out of and in the course of the employment. The Court held that there was no substantial support in the record for this conclusion, that all of the evidence was that the the work in which decedent was involved was strenuous and that "it seems clear that this was one of the times when his job was very strenuous."

To much the same effect is the previously cited case of *Hancock* v. *Einbinder,* 310 F.2d 872 (CA D.C., 1962), in which the Deputy Commissioner's findings that the death was not compensable was set aside. He had found that decedent "was not subjected to heavy physical strain or unusual exertion." The undisputed evidence was that the decedent had been performing his normal duties which included dragging 80 pound sacks across the floor.

A similar holding is *Mattison* v. *Brown,* 197 F.2d 414 (CA 7, 1952). In that case, the claimant fell and suffered injury, allegedly as a result of poisoning by carbon monoxide gas and sulfuric acid fumes. The Deputy Commissioner made a finding that the area in

which he was working had a roof about 40 feet high "with ventilation at the top." The undisputed evidence of plaintiff and one of his fellow workmen was that there was no ventilation. The Court held that the Deputy Commissioner's findings were unsupported by the record, and that the Deputy Commissioner's rejection order should be set aside.

Claimant recognizes that this Court, as well as other Courts, has held that the Deputy Commissioner is not required to accept the opinion or theory of a medical witness, and that his decision may be sustained if supported by the record as a whole, even if no doctor directly testifies to a causal relationship. *Crescent Wharf and Warehouse Co.* v. *Cyr,* 200 F.2d 633, 637 (CA 9, 1952); *Todd Shipyards Corp.* v. *Donovan,* 300 F.2d 741, 742 (CA 5, 1962). The cases previously cited, however, illustrate that the Deputy Commissioner can not reject the uncontradicted evidence regarding the basic facts. The Deputy Commissioner's factual determinations must find some support in the record; they cannot be sustained if they are diametrically opposed to the uncontradicted and credible evidence in the record.

The finding of the Deputy Commissioner in this case, that decedent's work was similar to that in which he was customarily engaged, and no more strenuous, is simply not in accordance with the record. By its very nature, longshoring work involves a diversity of different types of operations, and the evidence is undisputed that stowing timbers is one of the two heaviest

jobs on the waterfront. Moreover, any type of work involves peaks and valleys of exertion; the evidence is also undisputed that, at the moment of his collapse, decedent was straining to perform the hardest part of the heaviest work. As in the *Hancock* case, supra, "This was one of the times when his job was very strenuous."

D. On the Record as a Whole, Claimant is Entitled to Compensation.

The preceding propositions would appear to call for a remand for further proceedings. Once the facts have been developed, however, and the proper legal standard ascertained, claimant submits that only one result can be reached. Based upon the undisputed evidence in the record, this Court should follow the precedent set in the cases of *Vinson* v. *Einbinder* and *Hancock* v. *Einbinder,* discussed above, and set aside the compensation order as being without substantial support in the record. It is not necessary that claimant prove an unusual physical strain, extraordinarily heavy work, or a previously healthy condition. "It is enough if something unexpectedly goes wrong within the human frame."

CONCLUSION

The findings of the Deputy Commissioner are not supported by substantial evidence in the record taken as a whole, and his crucial finding is diametrically contradictory to the undisputed evidence. The judgment of the Court below should be reversed, and the

cause remanded with instructions to set aside the rejection order entered by the Deputy Commissioner.

Respectfully submitted,

POZZI, LEVIN & WILSON,
PHILIP A. LEVIN
Of Proctors for Appellant

APPENDIX OF EXHIBITS

The only exhibits in this record are those attached to the motion of the Deputy Commissioner for summary judgment. In a sense, the official report of proceedings (R. 17-74) is an exhibit to that motion. The only exhibit offered before the Commissioner was claimant's exhibit No. 1, identified, offered and received at R. 26 and appearing at R. 72-74.

CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

PHILIP A. LEVIN, Attorney